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BANK PERTANIAN MALAYSIA BHD v. KOPERASI PERMODALAN MELAYU NEGERI JOHOR

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
B HASAN LAH FCJ
RAMLY ALI FCJ
AZAHAR MOHAMED FCJ
[CIVIL APPEAL NO: 02(f)-4-02-2014(J)]
30 SEPTEMBER 2015

C

UNINCORPORATED ASSOCIATIONS: *Societies – Co-operative society – Application of by-laws – Charge created by co-operative society over its property in favour of lender as security for loan granted to developer – Whether ultra vires Co-operative Societies Act 1993 – Whether non-members entitled to rely on by-laws*
D *– Whether by-laws of co-operative society has force of law under s. 53 of Co-operative Societies Act 1993 – Whether there was clear nexus between loan facility and benefits to be derived by co-operative society*

BANKING: *Securities for advances – Guarantee – Co-operative society provided guarantee by way of a memorandum of deposit to bank and developer for*
E *development of project on land owned by society – Bank unilaterally uplifted fixed deposit following default by developer – Whether bank exhausted all legal remedies available – Whether unilateral uplifting of fixed deposit premature and contractually invalid – Whether uplifting entire fixed deposit rendered memorandum void ab initio – Whether society entitled to be put in position as if breach had not occurred*
F *– Whether society obliged to make payment for shortfall of deposit*

This was the appellant's ('the bank') appeal against the findings of the High Court and affirmed by the Court of Appeal, allowing the claim by the respondent ('Koperasi'), a co-operative society registered under the Co-operative Societies Act 1993 ('the 1993 Act'), for *inter alia*, a declaration
G that a guarantee by way of a third party memorandum of deposit ('MOD') for the sum of RM25 million given by Koperasi in favour of the bank was invalid and unenforceable and dismissing the bank's counterclaim for the shortfall of RM12 million which Koperasi undertook to pay progressively as security deposit pursuant to the MOD. At the material time, in order to
H develop certain lands owned by Koperasi as oil palm plantations, Koperasi engaged Estate and Forestry Consulting Management Sdn Bhd ('EFCM') and both parties entered into an agreement for EFCM to develop oil palm plantation on the said lands. As part of the agreement, Koperasi was to deliver and deposit with the financier *ie*, the bank a sum of RM25 million
I by way of security deposit. Following the execution of the agreement, the bank granted a term loan facility of RM25 million to EFCM, and Koperasi, pursuant to the facility agreement between the bank and EFCM, provided the

MOD. However, after the project had proceeded, Koperasi had only deposited RM13 million under the MOD, leaving a shortfall of RM12 million. In the meantime, EFCM defaulted in its repayment of the loan. Following legal action against EFCM, the bank proceeded to unilaterally uplift the deposit pledged by Koperasi under the MOD, and utilised it to reduce the debt due and owing under the loan. Koperasi disputed the validity of the MOD, stating that it was an invalid instrument and demanded the return of the amount deposited under the MOD. Hence the present action. In this appeal, the issues to be determined were (i) whether a charge created by a co-operative society over its property in favour of a lender as security for a loan granted by the lender to a developer, was *ultra vires* the 1993 Act and void if the lender and developer were not members of the co-operative, notwithstanding the by-laws of the co-operative society and purpose of the loan and charge, and its benefit to the co-operative society and promotion of the economy interest of its members; (ii) the remedies and obligations of the co-operative society in law if the charge is found to be *ultra vires* the 1993 Act; and (iii) whether the remedy of the chargor where the lender prematurely withdrew the security deposit before exhausting all action was, the return of the money, free of the charge (and any interest that would accrue) or restoration of the money on deposit, subject to the charge.

Held (allowing appeal with costs)
Per Ramly Ali FCJ delivering the judgment of the court:

(1) Generally, by-laws of a co-operative society, made by the society itself, were merely rules of conduct governing its internal management. However, by-laws of a co-operative society had been given the force of law under s. 53 of the 1993 Act. In view of the provision of s. 53, non-members (including the bank) were entitled to rely on Koperasi's by-laws as they related to 'other transactions' with them. The effect of words 'subject to ss. 51 and 52' in s. 53 of the 1993 Act was that transactions with non-members could not be inconsistent with ss. 51 and 52 as regards to loans to be granted by a co-operative society and funds to be borrowed by a co-operative society from member and non-member. Thus, 'transactions' under s. 53 must be one that relate to other types of transactions of a co-operative society subject to such prohibitions and restrictions as may be prescribed by its by-laws. (paras 64-66)

(2) The word 'transaction' in s. 53 of the 1993 Act herein should relate to such power to give effect to matters covered by Koperasi's by-laws, particularly paras. 4 and 5, where the object or purpose of Koperasi could be found. The MOD was the most essential collateral or security to the granting of the loan by the bank for EFCM to implement the project development on a turnkey basis for the benefit of Koperasi. Hence, the issuing of the MOD by Koperasi could not be treated in

isolation or independently. There was a clear nexus between the loan facility granted by the bank to EFCM, the project, the MOD and the benefits to be derived by Koperasi upon completion of the project. Consequently, those transactions were clearly in line with Koperasi's object for the promotion of the socio-economic interest of its members by way of capital investment and profitable business. (paras 76, 77 & 80)

(3) The Court of Appeal should not have relied on provisions of the 2007 amendment to the 1993 Act which were not in existence or not in force at the time when the relevant transactions took place in 2001-2002. Furthermore, the 2007 amendment had no retrospective effect and therefore should not have been considered at all in dealing with the present case. The words 'credit facility' was not defined anywhere in the 1993 Act prior to the amendments. Without an express definition in the relevant statute which governed the transaction in question, a 'guarantee' could not be said to be a 'credit facility' under the scope of ss. 51 and 52 of the 1993 Act. (paras 85, 86, 87, 90 & 91)

(4) The bank had not exhausted all actions against the borrower (EFCM) and the other security parties before exercising its right to withdraw or uplift the fixed deposit as required under cl. 4 of the MOD and cl. 13.2 of the facility agreement. Under the circumstances, the unilateral uplifting of the fixed deposit was premature and contractually invalid. However, as the MOD was held to be valid and enforceable, being a continuing security pledge or lien for the due payment to the bank during the facility period, the MOD was binding and could be enforced by both parties. The breach by the bank in prematurely uplifting the entire fixed deposit did not render the MOD *void ab initio*. In the circumstances, all that the Koperasi was entitled to was to be put in a position as if the breach had not occurred. (paras 99 & 100)

(5) The order directing the return of the fixed deposit amount placed under the MOD to Koperasi, was clearly against the principle that Koperasi should not be put in a better position than it would have been if the breach by the bank did not take place. All that should have been ordered was for re-instatement of the fixed deposits subject to terms of the MOD. (paras 101 & 102)

(6) The issue of non-completion of the project was not the concern of the bank. The bank's obligation was to provide and disburse the loan as certified by Koperasi in accordance with the facility agreement as well as the MOD. The bank may have been at fault in prematurely uplifting the deposit in violation of cl. 4 of the MOD, but that alone could not be a ground for Koperasi to refuse or neglect its obligation to make payment as stipulated in the schedule to the MOD. In that light, Koperasi was obliged to make payment for the shortfall of the deposit. (paras 114 & 115)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu ('bank') terhadap dapatan Mahkamah Tinggi dan disahkan oleh Mahkamah Rayuan, yang membenarkan tuntutan responden ('Koperasi'), sebuah koperasi berdaftar di bawah Akta Koperasi 1993 ('Akta 1993') bagi, antara lain, deklarasi bahawa jaminan melalui memorandum deposit pihak ketiga ('MOD') untuk jumlah RM25 juta diberikan oleh Koperasi atas nama bank adalah tidak sah dan tidak boleh dikuatkuasakan dan menolak tuntutan balas bank bagi kekurangan sebanyak RM12 juta di mana Koperasi bersetuju untuk membayar secara berperingkat sebagai deposit jaminan selaras dengan MOD. Pada waktu itu, bagi membangunkan tanah-tanah tertentu yang dimiliki oleh Koperasi sebagai ladang-ladang kelapa sawit, Koperasi menggunakan khidmat Estate and Foresty Consulting Management Sdn Bhd ('EFCM') dan kedua-dua pihak berkenaan membuat satu perjanjian bagi EFCM membangunkan ladang kelapa sawit di tanah tersebut. Sebagai sebahagian daripada perjanjian, Koperasi perlu menyampaikan dan mendepositkan dengan pembiaya iaitu bank tersebut sejumlah RM25 juta melalui deposit jaminan. Berikutan pemeteraian perjanjian tersebut, bank memberikan kemudahan pinjaman berjangka sebanyak RM25 juta kepada EFCM dan Koperasi, dalam menjalankan perjanjian kemudahan antara bank dan EFCM, turut menyediakan MOD. Walau bagaimanapun, selepas projek itu dijalankan Koperasi hanya mendepositkan RM13 juta di bawah MOD, meninggalkan baki sebanyak RM12 juta. Sementara itu, EFCM gagal membuat pembayaran balik pinjaman. Berikutan tindakan undang-undang terhadap EFCM, bank meneruskan, dengan secara sebelah pihak mengeluarkan deposit yang dijanjikan oleh Koperasi di bawah MOD dan menggunakannya untuk mengurangkan hutang yang masih terhutang dan yang perlu dibayar di bawah pinjaman. Koperasi mempertikaikan kesahihan MOD dengan menyatakan bahawa ia adalah satu instrumen yang tidak sah dan menuntut pemulangan jumlah yang didepositkan di bawah MOD. Oleh itu, rayuan ini. Dalam rayuan ini, isu-isu yang dibangkitkan adalah (i) sama ada gadaian yang diwujudkan oleh sesebuah koperasi atas hartanya memihak kepada pemberi pinjaman sebagai jaminan bagi pinjaman yang diberikan oleh pemberi pinjaman kepada pemaju adalah *ultra vires* Akta 1993 dan tidak sah jika pemberi pinjaman dan pemaju bukan ahli-ahli koperasi walaupun adanya undang-undang kecil koperasi dan tujuan pinjaman dan gadaian dan manfaatnya kepada koperasi dan penggalakan kepentingan ekonomi ahli-ahlinya; (ii) remedi dan obligasi koperasi dalam undang-undang jika gadaian didapati *ultra vires* Akta 1993; (iii) sama ada remedi kepada penggadai, di mana pemberi pinjaman secara pra-matang menarik balik deposit jaminan sebelum menggunakan semua tindakan adalah, pulangan wang, bebas daripada gadaian (dan apa-apa kepentingan yang akan terakru) atau pengembalian wang deposit, tertakluk kepada gadaian tersebut.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Ramly Ali HMP menyampaikan penghakiman mahkamah:

(1) Secara umumnya, undang-undang kecil sesuatu koperasi yang dibuat oleh pertubuhan itu sendiri adalah semata-mata peraturan yang mengawal pengurusan dalamannya. Walau bagaimanapun, undang-undang kecil koperasi telah diberi kuasa undang-undang di bawah s. 53 Akta 1993. Mengikut peruntukan s. 33 sesebuah pertubuhan yang bukan ahli (termasuk bank) berhak untuk bergantung kepada undang-undang kecil koperasi kerana ia berkait dengan 'other transactions' dengan mereka. Kesan ungkapan 'subject to ss. 51 and 52' dalam s. 53 Akta 1993 adalah bahawa transaksi-transaksi dengan bukan ahli tidak boleh menjadi tidak konsisten dengan ss. 51 dan 52 berkaitan dengan pinjaman yang akan diberikan oleh Koperasi dan dana untuk dipinjam oleh Koperasi daripada ahli dan bukan ahli. Justeru, 'transactions' di bawah s. 53 harus menjadi salah satu yang berkaitan dengan lain-lain jenis transaksi koperasi tertakluk kepada larangan dan sekatan sebagaimana yang ditetapkan oleh undang-undang kecilnya.

(2) Ungkapan 'transaction' dalam s. 53 Akta 1993 sepatutnya berkaitan dengan apa-apa kuasa yang memberi kesan kepada perkara-perkara yang diliputi oleh undang-undang kecil Koperasi, terutamanya perenggan 4 dan 5 di mana objektif atau tujuan Koperasi boleh ditemui. MOD adalah cagaran atau jaminan yang penting kepada pemberian pinjaman oleh bank kepada EFCM untuk melaksanakan pembangunan projek atas dasar turnkey bagi kepentingan Koperasi. Maka, pengeluaran MOD oleh Koperasi tidak boleh dipertimbangkan secara berasingan atau secara bebas. Terdapat kaitan jelas antara kemudahan pinjaman yang diberikan oleh bank kepada EFCM, projek, MOD dan kepentingan-kepentingan yang akan diperolehi oleh Koperasi dengan penyiapan projek tersebut. Oleh itu, transaksi-transaksi tersebut adalah jelas selaras dengan objektif Koperasi untuk menggalakkan kepentingan sosio-ekonomi ahli-ahlinya melalui pelaburan modal dan perniagaan yang menguntungkan.

(3) Mahkamah Rayuan tidak sepatutnya bergantung kepada peruntukan pindaan 2007 kepada Akta 1993 yang tidak wujud atau tidak berkuatkuasa pada masa transaksi-transaksi relevan berlaku pada 2001-2002. Tambahan pula, pindaan 2007 tidak mempunyai kesan retrospektif dan oleh itu tidak harus dipertimbangkan sama sekali dalam pengendalian kes ini. Ungkapan 'credit facility' tidak ditakrif di mana-mana dalam Akta 1993 sebelum pindaan tersebut. Tanpa pentakrifan nyata pada statut relevan yang berkaitan dengan transaksi yang dipersoalkan, suatu 'guarantee' tidak boleh dikatakan sebagai 'credit facility' di bawah skop ss. 51 dan 52 Akta 1993.

(4) Bank tidak menggunakan kesemua cara untuk bertindak terhadap peminjam (EFCM) dan pihak-pihak penjamin yang lain sebelum menjalankan haknya untuk menarik balik atau mengeluarkan deposit tetap seperti yang termaktub di bawah kl. 4 MOD dan kl. 13.2 perjanjian kemudahan. Dalam keadaan ini, mengeluarkan deposit secara sebelah pihak adalah pramatang dan tidak sah dari segi kontrak. Walau bagaimanapun, oleh kerana MOD diputuskan sebagai sah dan boleh berkuatkuasa, menjadi suatu ikrar jaminan berterusan atau lien bagi pembayaran kepada bank dalam tempoh kemudahan tersebut, MOD adalah mengikat dan boleh dikuatkuasakan oleh kedua-dua pihak. Pelanggaran oleh bank dengan secara pramatang mengeluarkan kesemua deposit tetap tidak menjadikan MOD *void ab initio*. Dalam keadaan ini, Koperasi berhak untuk dikembalikan ke kedudukan seolah-olah pelanggaran tidak berlaku.

(5) Perintah mengarahkan pemulangan jumlah deposit tetap yang diletakkan di bawah MOD kepada Koperasi adalah jelas bertentangan dengan prinsip bahawa Koperasi tidak seharusnya diletakkan dalam suatu kedudukan yang lebih baik daripada sepatutnya jika pelanggaran oleh bank tidak berlaku. Apa yang sepatutnya diperintahkan adalah pengembalian deposit tetap tertakluk kepada terma-terma MOD.

(6) Isu kegagalan menyiapkan projek tidak melibatkan bank. Tanggungjawab bank adalah untuk menyediakan dan membayar pinjaman seperti yang disahkan oleh Koperasi sejajar dengan perjanjian kemudahan serta MOD tersebut. Bank mungkin telah terkhilaf dalam mengeluarkan deposit secara pramatang yang melanggar kl. 4 MOD tetapi itu sahaja tidak boleh dijadikan alasan bagi Koperasi untuk menolak atau mengabaikan kewajipannya untuk membuat pembayaran seperti yang ditetapkan dalam jadual kepada MOD. Dengan itu, Koperasi diwajibkan untuk membuat pembayaran untuk kekurangan deposit tersebut.

Case(s) referred to:

Badan Pengurusan Bersama Paradesa Rustika v. Sri Damansara Sdn Bhd [2013] 9 CLJ 813 FC ***(refd)***

C & P Haulage (a firm) v. Middleton [1983] 3 All ER 94 ***(refd)***

Chase Manhattan Bank, NA v. The Mercantile Co-Operative Thrift & Loan Society Ltd [1992] 3 CLJ 1346; [1992] 1 CLJ (Rep) 35 SC ***(foll)***

Hadley v. Baxendale [1854] 9 Ex 341; 156 ER 145 ***(refd)***

Keith Sellar v. Lee Kwang And Tennakoon V Lee Kwang [1980] 1 LNS 36 FC ***(refd)***

Koufos v. C Czarnikow Ltd [1969] 1 AC 350 ***(refd)***

Lembaga Jurutera Malaysia v. Leong Pui Kun [2008] 6 CLJ 93 FC ***(refd)***

Malaysia Shipyard & Engineering Sdn Bhd v. Bank Kerjasama Rakyat (M) Bhd [1985] 2 CLJ 427; [1985] CLJ (Rep) 206 SC ***(foll)***

PP v. Datuk Hj Harun Hj Idris & Ors [1977] 1 LNS 92 HC ***(refd)***

Robinson v. Harman [1843-1860] All ER Rep 383 ***(refd)***

Small v. Smith [1884-85] 10 AC 119, 138 ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Legislation referred to:
Bank Pertanian Malaysia Act 2008, s. 4(1)
Co-operative Societies Act 1993, ss. 2, 4(1), 9, 18, 51(1), 52, 53
Contracts Act 1950, s. 79
Interpretation Acts 1948 and 1967, ss. 18, 19(1), 30(1)
Malaysia Co-operative Societies Commission Act 2007, s. 2

Other source(s) referred to:
Halsbury's Law of England, 4th edn, para 1333, p 779

For the appellant - Lambert Rasa-Ratnam (Mong Chung Seng & Chia Oh Sheng with him); M/s Lee Hishammuddin Allen & Gledhill
For the respondent - Ng Chew Hor (Kunasegaran Nadesen with him); M/s Baharudin, Wan & Kuna

[Editor's note: For the Court of Appeal judgment, please see Bank Pertanian Malaysia Berhad v. Koperasi Permodalan Melayu Negeri Johor [2014] 1 LNS 595.]

Reported by S Thara

JUDGMENT

Ramly Ali FCJ:

[1] The respondent in the present appeal, Koperasi Permodalan Melayu Negeri Johor was the plaintiff while the appellant, Bank Pertanian Malaysia Berhad was the defendant in the suit at the High Court. For ease of reference, the respondent herein shall be referred to as the "the koperasi" and the appellant as "the bank".

[2] The koperasi, at all material times is a body corporate or co-operative society registered under the Co-operative Societies Act 1993 (the 1993 Act) (which as provided for under cl. 4 of its by-laws) has as its object the promotion of economic interest of its members in accordance with co-operative principles. It was first registered on 3 March 1966 (under the earlier 1948 Act which was replaced by the 1993 Act). Its main objective involves the development of land in various sectors including agricultural and commercial development.

[3] The bank, is a body corporate duly incorporated pursuant to the Bank Pertanian Malaysia Act 1969 (which was wholly repealed and substituted by the Bank Pertanian Malaysia Berhad Act 2008 (the 2008 Act). By virtue of s. 4(1) of the 2008 Act, all properties, rights and liabilities of the former Bank Pertanian Malaysia were transferred to and vested in the bank.

[4] The present appeal before us is against the decision of the High Court (which was later affirmed by the Court of Appeal) which allowed claim by the koperasi for *inter alia* a declaration that a third party memorandum of deposit dated 22 March 2002 for the sum of RM25 million (the MOD) given by the koperasi in favour of the bank is invalid and unenforceable.

Factual Background

[5] Sometimes in 2000 - 2001, there were two (2) pieces of undeveloped lands known as Lot PT4888, Mukim Ulu Nenggiri, Daerah Bertam; and Lot 3647, Mukim Relai, Daerah Chiku both in Gua Musang, Kelantan. The combined size of both lands were 10,291.40 acres. Both lands were owned by Yayasan Kelantan Darulnaim (YAKIN) but were leased to a private company known as Terokai Pertiwi Sdn Bhd (TPSB) for a term of 66 years. They were both classified as agricultural land for the purpose of oil palm plantations.

[6] In line with its main objective to develop land in various sectors including agricultural and commercial development, the koperasi had on 26 February 2001 taken over the whole equity of TPSB for a sum of RM12.5 million. Since that date TPSB became a wholly-owned subsidiary of the koperasi. In other words, the lands in question were effectively leased by the koperasi through a wholly-owned subsidiary, TPSB.

[7] In order to develop the lands as oil palm plantations, the koperasi engaged another private company known as Estate and Forestry Consulting Management Sdn Bhd (EFCM). EFCM was incorporated as a private limited company under the Companies Act 1965 on 14 July 1995, which at the material time was carrying on, *inter alia*, the business of consultation, development and plantation of oil palm.

[8] On 12 November 2001, the koperasi and EFCM entered into an agreement known as the oil palm plantation and development agreement plantation and development agreement whereby the koperasi appointed EFCM to develop oil palm plantation on the said lands, based on the representation made by EFCM that it had the requisite technology, expertise, experience and financial resources to undertake the development and planting of oil palm.

[9] Some of the salient terms of the plantation and development agreement which may be relevant to the present appeal before us are as follows:

(a) EFCM agreed to undertake the implementation of the project to develop the said lands into an oil palm plantation in accordance with the layout plan (recitals 6-7);

(b) the koperasi agreed to accept the benefits from EFCM and upon completion of the project, the koperasi will pay EFCM the sum of RM40 million (s. 2.01(1));

(c) the effectiveness of the plantation and development agreement and the rights and obligations of the parties thereto are first subject to the fulfilment and satisfaction of the condition precedents, *inter alia*, that EFCM shall secure financing for the said project development (art. IV(4));

(d) the koperasi shall deliver to and deposit with the financier (for the project development) a sum of not more than RM25 million by way of security deposit (s. 2.01(2));

(e) the koperasi will provide a letter of guarantee from a bank in respect of the balance of payment due to EFCM amounting to RM15 million upon completion of the project development (s. 2.01(3)); and

(f) the koperasi may consent to the security deposit be treated as collateral to account of the disbursement made by the financier to EFCM, provided that any utilisation of the security deposit shall only upon certification by the koperasi of work completed and only to the extent of the value of the work completed (s. 5.01(4)).

[10] After the execution of the plantation and development agreement between the koperasi and EFCM, the bank *vide* a letter of offer dated 6 December 2001 and a facility agreement dated 22 March 2002 granted a term loan facility of RM25 million to EFCM (as the borrower) for the purpose of financing the said project development.

[11] Paragraph 2 of the letter of offer dated 6 December 2001 issued by the bank states:

> TUJUAN
>
> Pinjaman Berjangka adalah untuk membiayai sebahagian daripada kos kontrak membangunkan dua keping tanah seluas 10,291.49 ekar dengan tanaman kelapa sawit secara 'turnkey basis' di Gua Musang, Kelantan

[12] The facility agreement (between the bank and EFCM dated 22 March 2002) clearly made reference to the said project development in the plantation and development agreement dated 12 November 2001. The same recital also made reference to the request for the loan made by EFCM and the bank's letter of offer dated 6 December 2001 which clearly indicates that the purpose of the loan facility was for the development of 10,291.49 acres of land into oil palm plantation on "turnkey basis" in Gua Musang, Kelantan.

[13] Clause 1.3 of the facility agreement provides for securities for the loan, to be provided to the satisfaction of the bank:

(a) duly executed facility agreement between the bank and EFCM;

(b) the third party memorandum of deposit dated 22 March 2002 (the MOD) granted by the koperasi in favour of the bank by way of a fixed deposit under Al-Mudharabah principle;

(c) a third party first legal charge over the land held under H.S(D) No. 428 PTD No. 4509 in the Mukim of Ulu Nenggiri, in the District of Gua Musang, in the State of Kelantan in approximate area of 607.3 hectares by Alan-Asra Agroturas Sdn Bhd;

(d) a third party first legal charge over the land at Aring 4 & 5, Relai, Chiku, Gua Musang, Kelantan in approximate area of 607 hectares (upon issuance of individual document of title) in favour of the bank;

(e) a deed of assignment issued by EFCM on proceeds of payments on the project development it received from the koperasi;

(f) a deed of debenture issued by EFCM over its present and future fixed and floating assets; and

(g) a joint and several letter of guarantee and indemnity by the directors of EFCM namely: i) Hassan Fikri bin Mohamed; and ii) Mohd Rasulludin Deaver, in favour of the bank.

[14] The facility agreement was duly executed on 22 March 2002 by EFCM and the bank.

[15] The koperasi, in fulfilling the abovementioned security requirement executed the MOD dated 22 March 2002 in favour of the bank. Paragraph 1.1 of the MOD, states that the koperasi "hereby deposit with the bank the Investment Account Certificate ... made out in the bank's favour for a total sum of Ringgit Malaysia Twenty Five Million (RM25,000,000 only) which shall be held by the bank as a continuing security pledge or lien for the due payment to the bank by the borrower (EFCM) on demand of all monies due to the bank during the facility period". It is also stated in the same paragraph that the deposit of the MOD was made in consideration of the bank "at our consent, granting or continuing to grant a facility up to a maximum aggregate principal amount of Ringgit Malaysia Twenty Five Million (RM25,000.000) only to Estate & Forestry Consulting Management Sdn Bhd ... upon the terms and subject to the conditions stipulated in the facility agreement ...".

[16] One pertinent point to the issue in the koperasi's claims in the present case is found in para. 4 of the MOD, which reads:

> KPMNJ (the Koperasi) hereby agrees that in the event the Borrower (EFCM) fails to repay the Facility due and owing to the Bank together with interest or other cost incurred during the facility period and Provided Always that the Bank has exhausted all available legal actions or proceedings against the Borrower and other security party(s) to recover amount due and owing by the Borrower to the Bank, the Bank are at liberty to withdraw the said Deposit or such other sum(s) as may be from time to time substituted for or replacing the said Deposit and to apply the proceeds thereof in or towards the discharged to any amount due to the Bank.

[17] The project development proceeded after the execution of all the relevant documentations were executed. As between 28 March 2002 to 10 May 2004, the koperasi (using its own letterhead, signed by its Director/ Planting Advisor Hj Dzulkefli bin Hj Nasir and Pengurus Besar Hj Ariff Kassim) issued various Certificates of Practical Completion to the bank for the purpose of disbursement of the loan. Accordingly, the bank had

progressively disbursed loan to EFCM as developer of the project development. As at 1 June 2003, the koperasi however had only deposited and pledged the sum of RM13 million with the bank under the MOD leaving a shortfall of RM12 million. Thereafter, the koperasi failed to deposit the shortfall despite reminders by the bank.

[18] In the meantime, EFCM defaulted in repayment of the loan. On 5 March 2007, the bank commenced legal proceedings against EFCM for recovery of the loan. On 22 June 2007, the bank obtained judgment in default against EFCM.

[19] On 6 December 2007, the bank uplifted the deposit pledged by the koperasi under the MOD, and utilised it to reduce the debt due and owing under the loan.

[20] On 31 December 2007, the koperasi, through its solicitors, for the first time, disputed the validity of the MOD dated 22 March 2007 issued in favour of the bank. The koperasi claimed that the MOD was "an invalid instrument" and demanded that the amount deposited under the MOD (together with interest accrued) be returned to it within seven (7) days from the date of the letter.

[21] On 2 April 2008, the koperasi commenced the present claim in the High Court against the bank for *inter alia* a declaration that the MOD in question was *ultra vires* and *void ab initio*, and sought the return of the fixed deposits uplifted by the bank. The bank counterclaimed for the sum of RM12 million, being the shortfall due from the koperasi pursuant to the MOD.

[22] At the date when the koperasi commenced the present claim in the High Court, the bank had disbursed the sum of RM23,935.000 to EFCM under the facility agreement for the purpose of the project development in question. This is based on the evidence adduced by the bank. Even based on the progressive certificates issued by the koperasi, the value of work done in the project (as certified by the koperasi) was RM20,188,336.65. On the evidence adduced during trial, EFCM had abandoned the work. There was no evidence to show that the koperasi had paid EFCM the sum due to EFCM under the plantation and development agreement or any part of it.

[23] The project development had been substantially completed at the time the action was filed in the High Court. This is evidenced by the various reports namely the "Laporan Progress Kerja dan Penyata Perbelanjaan Kontrak Turnkey" as well as in the certification in the "Confirmation and Certification of Sums Expended To Date Being Part Development Expenditure Under Turnkey Project For the Development of Oil Palm Plantation of Teroka Pertiwi Sdn Bhd (A wholly subsidiary of KPMNJ) in Gua Musang" issued by the koperasi from time to time during the project period (see: Tabs 12, 13, 14 and 18 of the common core bundle 3).

At The High Court

[24] After full trial, the learned Judicial Commissioner allowed the koperasi's claim and dismissed the bank's counterclaim. In dealing with the matter before him, the learned Judicial Commissioner identified two (2) issues to be determined, namely:

(a) the validity of the MOD for which the koperasi has prayed for a declaration to the effect that it was invalid and for the return of the money deposited under the MOD together with profit accrued thereon; and

(b) breach of contract by the bank in infringing the terms of the MOD by premature liquidation or uplifting of the fixed deposit of RM13 million together with profit accrued thereon.

[25] On the first issue (the validity of the MOD), the learned Judicial Commissioner held that the MOD was *ultra vires* the provisions of the 1993 Act and invalid on the ground that the 1993 Act contains no power to authorise the koperasi to issue guarantee by way of an MOD in favour of the bank. In coming to that finding the learned Judicial Commissioner relied strongly on the decisions of the Supreme Court in *Malaysia Shipyard & Engineering Sdn Bhd v. Bank Kerjasama Rakyat (M) Bhd* [1985] 2 CLJ 427; [1985] CLJ (Rep) 206; [1985] 2 MLJ 359; and *Chase Manhattan Bank, NA v. The Mercantile Co-Operative Thrift & Loan Society Ltd* [1992] 3 CLJ 1346; [1992] 1 CLJ (Rep) 35; [1992] 2 MLJ 168.

[26] In his grounds of judgment (at para. 27) the learned Judicial Commissioner held:

> [27] In construing sections 51, 52 and 53 of the COS Act 1993 strictly in accordance with the words used, I upheld P's Contention that based on the principles enunciated in the Supreme Court Cases of *Malaysia Shipyard* (*supra*) and *Chase Manhattan* (*supra*), there could be no other conclusion except that this Act contains no powers to authorise P to issue the guarantee to D by way of the MOD. Whether P challenged the validity of the guarantee after the loan was fully disbursed was irrelevant as the legality of the instrument was in question. The defence contention that from a literal reading of the above sections there was no prohibition against the giving of security to a non-member was clearly untenable as the law as it stands is that there must be an express provision authorising the cooperative to do so in order for giving of the said security to be valid in law. The power to bind the society to a contract of guarantee as in the present case must be properly sanctioned by statute for the contract to be enforceable.

[27] Further (at para. 30 of the grounds of judgment) the learned Judicial Commissioner continued:

> [30] The object provision which was considered to take precedence was the basis of these decisions in holding that the guarantee in the first case and the pledge/set-off in the second case were invalid for being *ultra vires*

A the COS Act 1948. The guarantee issued by P in the instant case to a non-member for the benefit of another non-member was certainly against the object provision of the COS Act 1993. Far from promoting the economic interests of its members its effect was to jeopardise their economic interests by imposing a heavy liability on the society. I therefore held that the MOD issued by P was null and void for being in contravention with
B s. 4 of the COS Act 1993. It was *void ab initio* and of no effect. In view of this decision, D's counterclaim for RM12.000.000.00 being the balance of the security sum which P should have deposited into the FD under the terms of the MOD together with interest from date of default had no basis whatsoever and had to be rejected.

C **[28]** On the second issue, the learned Judicial Commissioner, held that the bank had breached the terms of the MOD by uplifting the fixed deposits pledged, before it exhausted all legal action against EFCM and other security providers.

[29] Abiding by the decision of the High Court, the bank returned the
D fixed deposits uplifted together with interest on them (which in total came to the sum of RM18,035,057.35) to the koperasi on 30 November 2012.

At The Court Of Appeal

[30] The Court of Appeal agreed with and affirmed the decision of the
E High Court and dismissed the bank's appeal with costs of RM50,000. In coming to its decision, the Court of Appeal "respectfully adopt the trite principle laid down by the Supreme Court in the case of *Malaysia Shipyard* (*supra*) that a statutory corporation can only do what is expressly authorised by the Act under which it is incorporated".

F **[31]** The Court of Appeal agreed with and accepted the submission of learned counsel for the koperasi that the issue of the validity of the MOD must be determined by reference to the provisions in the 1993 Act and not by reference to the koperasi's by-laws since by-laws are rules of conduct which govern the internal government of the koperasi.

G **[32]** The Court of Appeal rejected submissions by learned counsel for the bank that the koperasi was allowed by its by-laws (in particular by-law 5(g)) to grant the MOD in favour of the bank. In doing so, the Court of Appeal stated:

H [39] The by-laws of any statutory corporation can only provide for matters that are permissible under the Act and any by-laws which purports to allow what is prohibited by the Act, or are inconsistent with the provisions of the Act will, to that extent, be invalid for being *ultra vires* the Act. This is clearly provided by s. 17A(1) of the Act which states as follows:

I Application of by-laws

17A. (1) Any by-laws of a co-operative society which are inconsistent with the provisions of this Act shall be void to the extent of its inconsistency. Accordingly, no co-operative society can, by way of its by-laws, confer upon itself any power to enter

> into any transaction that has been expressly prohibited by the principal Act. Any by-laws which purports to allow a co-operative society to do what is expressly prohibited by the Act would be invalid for being *ultra vires* the Act. Therefore we are unable to agree with learned counsel for the Appellant that by-law 5(g) allows the Respondent to do what is prohibited by s. 51(1). Further a perusal of by-law 5(g) shows that it is general in nature. It is also subject to the Act and the regulations. Hence by-law 5(g) must necessarily be read to apply only to those transactions that are permissible under the Act.

[33] On this issue, the Court of Appeal concluded that "the MOD is invalid and unenforceable as it was issued in contravention of s. 51(1) of the Act".

[34] What is interesting to observe here is that, from the judgment of the Court of Appeal, we find that the reasoning of the Court of Appeal, in essence, is the same as that of the High Court, save for one material difference ie, in arriving at its decision, the Court of Appeal apparently applied the 1993 Act as amended by the Co-operative Societies (Amendment) Act 2007 (Act A1297) which only came into force on 1 January 2008 (the 2007 Amendment); while the relevant transaction, particularly the granting of the MOD in favour of the bank by the koperasi took place on 22 March 2002.

[35] On the issue of breach of contract, the Court of Appeal, surprisingly after finding that the contract document ie, the MOD was invalid and unenforceable, agreed with the High Court that "the learned JC is correct in his finding that the appellant's act was premature and amounted to a breach of contract".

At The Federal Court

[36] Leave to appeal to the Federal Court was granted on 20 January 2014 on the following questions, namely:

(a) whether a charge created by a co-operative society over its property in favour of a lender as security for a loan granted by the lender to a developer, is *ultra vires* the Co-operative Societies Act 1993 and void if the lender and developer are not members of the co-operative society notwithstanding:

  (a) the by-laws of the co-operative society; and

  (b) the purpose of the loan and charge, and its benefit to the co-operative society and promotion of the economy interest of its members (question (1));

(b) if the answer to question (1) is in the affirmative or the charge is otherwise *ultra vires* the Co-operative Societies Act 1993 and void, what are the remedies and obligations of the co-operative society in law (question (2)); and

(c) where a sum of money deposited is charged in favour of a lender as security for a loan on terms that it is not to be withdrawn until the lender has exhausted all action against the borrower and other security providers, but the money is prematurely withdrawn by the lender before exhausting all action, whether the remedy of the chargor is:

(a) the return of the money, free of the charge; or

(b) the restoration of the money (and any interest that would accrued) on deposit, subject to the charge (question (3)).

The Bank's Submissions

[37] In essence, the submissions by learned counsel for the bank can be summarised as follows:

(a) the Court of Appeal was wrong to apply the 2007 Amendment (Act A1297) in determining the validity of the MOD on the ground that at the time of the MOD was created by the koperasi on 22 March 2002, the koperasi (as well as other cooperative societies) were governed by the 1993 Act as the 2007 Amendment (Act A1297) only came into force on 1 January 2008, six (6) years after the MOD was created; and on settled principles, the 1993 Act, and not the 2007 Amendment (Act A1297), is the applicable statute to determine the validity of the MOD;

(b) applying the 1993 Act, the MOD is not *ultra vires* the said Act;

(c) the decisions of the Supreme Court in *Malaysia Shipyard* (*supra*) and *Chase Manhattan* (*supra*) and which were strongly relied upon by High Court as well as the Court of Appeal were based on the court's interpretation of the 1948 Act, in particular, ss. 30, 31 and 32 thereof;

(d) the 1948 Act was completely repealed and subsequently replaced by the 1993 Act; and the matters covered by ss. 30, 31 and 32 thereof were then governed by ss. 51, 52 and 53 of the 1993 Act;

(e) under s. 53 of the 1993 Act, other transactions between a co-operative society and non-members were then governed by the by-laws of the co-operative society concerned and applying s. 53 of the 1993 Act, the MOD was not *ultra vires* the 1993 Act;

(f) the koperasi's by-laws (particularly para. 4 and 5) expressly and by necessary implication, authorise the koperasi to charge its assets and also to enter into transactions with non-members;

(g) the MOD created by the koperasi in favour of the bank in the present case was directly and indirectly for the benefit of the koperasi and the promotion of the economic interest of its members, thus was in accord with the main object of the koperasi;

(h) the courts below were wrong to hold that the MOD was *ultra vires* the 1993 Act on the basis of the two Supreme Court's decisions (*supra*) without regard to the by-laws of the koperasi, the purpose of the loan granted by the bank and the MOD created by the koperasi in favour of the bank, its benefit to the koperasi and promotion of the economic interest of its members;

(i) it was also wrong for the courts below to hold that the bank was not entitled to rely on the by-laws of the koperasi, given that s. 53 of the 1993 Act expressly provides that other transactions with non-members are to be governed by the by-laws of the co-operative society concerned;

(j) that question 1 on the issue of validity of the MOD ought to be answered in the negative, as the koperasi was not prohibited or restricted by its by-laws from creating the MOD in favour of the bank;

(k) even if the courts below were right to hold that the MOD was *ultra vires* the 1993 Act and therefore void, they ought to have ordered the fixed deposit be returned, subject to the koperasi restoring to the bank the advantage or benefit received by the koperasi from the project development and the loan granted by the bank (to at least pay the sum of RM20,188,336.65 to the bank, being the amount certified by the koperasi as the value of work done on the project land); the koperasi therefore is obliged to make restitution and restore the benefit it enjoyed under the arrangement to the bank;

(l) even if the bank had breached the terms of the MOD (if the MOD is not *ultra vires* the 1993 Act), by uplifting the fixed deposit before exhausting all legal action against EFCM (the borrower) and the other security providers, all the koperasi was entitled to was reinstatement of the deposits subject to the terms of the MOD (to be put in a position as if the breach had not occurred) and damages (if any); and the koperasi was not entitled to the return of the fixed deposit, free of charge created under the MOD; and

(m) the appeal by the bank ought to be allowed and the decisions of the courts below be set aside; and the bank's counterclaim for the shortfall of RM12 million under the MOD should be allowed and judgment be entered against the koperasi for the said sum of RM12 million together with interest.

The Koperasi's Submissions

[38] Submissions by learned counsel for the koperasi can be summarised as follows:

(a) both the High Court and the Court of Appeal were correct in coming to their decisions in favour of the koperasi based on the facts of the case;

(b) the authorities relied on by the learned Judicial Commissioner and later adopted by the Court of Appeal (*Malaysia Shipyard* and *Chase Manhattan*) are correct and applicable to the facts of the present case;

(c) the bank had not asked for any relief that any advantage the koperasi may have received be restored to the bank; this point had not been raised at the High Court nor at the Court of Appeal; and the bank should not be allowed to raise it now, before this court;

(d) it is trite law that parties are bound by their pleadings and the court can only decide on the pleaded issues;

(e) if the MOD has been declared void by the courts below, the facility agreement between the bank (as the lender) and EFCM (as the borrower) still remains valid and enforceable and the bank can still take legal action against EFCM (as the borrower);

(f) the loan was granted and released to EFCM (as the borrower) under the facility agreement, and not to the koperasi; therefore the person who has received the advantage "under such agreement or contract" is EFCM (the borrower) and not the koperasi;

(g) there is no advantage received by the koperasi under the MOD for the koperasi to restore to the bank and the MOD only creates an obligation on part of the koperasi;

(h) on the issue of the premature uplifting of the fixed deposit and breach of the express terms of the MOD, the facts clearly demonstrate that the proviso to cl. 4 of the MOD have not been fulfilled by the bank ie, the bank had not exhausted all available legal actions or proceedings against the borrower and other security party to recover the amount due and owing by EFCM to the bank, before uplifting the fixed deposit and therefore the bank was clearly in breach of the terms of the MOD.

Findings

[39] In determining the validity of the MOD issued by the koperasi in favour of the bank, we have to first determine the applicable law to the facts of the present case. This is because the High Court had strongly relied on the two Supreme Court decisions in *Malaysia Shipyard* (*supra*) and *Chase Manhattan* (*supra*) in coming to its findings that the MOD in the present case was invalid, void and unenforceable.

[40] It must be noted that the findings of the Supreme Court in *Malaysian Shipyard* (*supra*) and *Chase Mahathan* (*supra*) were based on the interpretation of the provisions of the Co-operative Societies Act 1948 (Act 287) (the 1948 Act), which were first enacted in 1948 as the F.M. Ordinance No. 33 of 1948 and later revised and came into force on 18 August 1983. This 1948 Act was wholly repealed and replaced by the 1993 Act which came into force in February 1993).

[41] In *Malaysia Shipyard* (*supra*), the respondent, a co-operative society registered under the 1948 Act, issued a guarantee whereby it agreed to indemnify the appellant therein, up to a sum of RM500,000 in the event of a certain company called Syarikat Pembinaan Azlin Sdn Bhd (Azlin Sdn Bhd) failed to perform its contract with the appellant which was signed by the parties on 29 September 1975. Azlin Sdn Bhd failed to perform the contract, whereupon the appellant terminated the said contract and thereafter sued the respondent upon the guarantee. The said guarantee was given to a non-member for the benefit of another non-member. From the judgment, there was no indication as to the nature of the contract between Azlin Sdn Bhd and the appellant therein. There was also no evidence to show as to whose benefit the contract was for, and whether such transaction is conducive or otherwise to the economic well-being of members. The majority decision in that case (comprising of Salleh Abas LP, Abdul Hamid CJ (Malaya) and Abdoolcader SCJ) ruled that applying the provisions of s. 32 of the 1948 Act, the said guarantee was *ultra vires* and *void ab initio*; while the dissenting decision (comprising of Wan Suleiman SCJ and Seah SCJ) ruled that the said guarantee was *intra vires* and was therefore lawful and valid. As aptly expressed by Seah SCJ; "There is apparently no dispute as to the general principle applicable but we seem to differ on the interpretation of the provision of s. 32 of the Act".

[42] The Supreme Court considered the provisions of ss. 30, 31 and 32 of the 1948 Act. For ease of reference, these sections are reproduced below:

> 30 (1) A registered society may make loans:
>
> (a) to its members;
>
> (b) to its employees;
>
> (c) to its subsidiaries; or
>
> (d) to another registered society which has obtained the approval of the Registrar-General as prescribed by the rules.
>
> (2) (Deleted by Act A334)
>
> (3) The Minister may, by general or special order prohibit or restrict the lending of money on a mortgage or charge of any description of immovable property by any registered society or class of registered societies.
>
> 31. A registered society shall receive deposits and loans from persons who are not members only to such extent and under such conditions as may be prescribed by the rules or by-laws.
>
> 32. Save as provided in sections 30 and 31 the transaction of a registered society with persons other than members shall be subject to such prohibitions and restrictions as may be prescribed by the rules.

[43] The Supreme Court in interpreting the relevant provisions of the 1948 Act adopted an earlier principle as laid down by the House of Lords in *Small v. Smith* [1884-85] 10 AC 119, 138 which was succinctly stated in *Halsbury's Law of England*, 4th edn, para. 1333, at p. 779 as follow:

> The power of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.

[44] The majority decision of the Supreme Court in that case ruled:

> In the present case before us, there is also no express provision in either the Co-operative Act (referring to the 1948 Act) or the rules enabling the Respondents to issue the guarantee and, if we apply the above-quoted words, it is clear that the Respondents have no power to issue the impugned guarantee. Section 32 which empowers them to enter into "transactions" with non-members subject to prohibitions and restrictions prescribed by the rules is of no avail. For one thing the rules are completely silent as to the transactions referred to by the section and surely the absence of any provisions in the rules provides some indication that whatever transactions which a cooperative society can enter into these will not include the issuing of a guarantee.

[45] The majority decision ruled that s. 30 of the 1948 Act deals specifically with loans given by a cooperative society to those parties listed therein; while s. 31 deals with borrowings by a co-operative society by receiving deposits and loans from persons who are not members as prescribed by its by-laws. These two sections may not be directly applicable in the determination of the issue before the court.

[46] The majority decision in that case was later adopted and followed in another case, *Chase Manhattan* (*supra*) which interpreted the same provisions of s. 32 of the 1948 Act in relation to the same issue of giving of guarantee by a co-operative society in favour of a third party.

[47] It must be noted that s. 32 of the 1948 Act, which formed the basis of the Supreme Court decision in *Malaysia Shipyard* (*supra*) provides for "... such prohibitions and restrictions as may be prescribed by the rules". As provided for under s. 2 of the 1948 Act; "rules" means rules made under the Act ie, made by the minister under s. 51 of the Act. Section 32 of the 1948 Act did not make any reference to by-laws of a co-operative society. Therefore, the Supreme Court had rightly referred to only the provisions of the Act and the rules made thereunder in determining the validity of the guarantee without referring to any by-laws. This was clearly stated by Salleh Abas LP at p. 360 of the report:

The question is, therefore, this: Are the Respondents empowered by the Act and/or the Rules made under the Act to give such guarantee? If they are, the guarantee is valid and if they are not, the guarantee is not valid.

[48] As rightly found by the Supreme Court neither the provisions of the 1948 Act, nor the rules made thereunder, expressly empower the co-operative society to issue guarantee.

[49] As stated earlier, the whole of the 1948 Act was subsequently repealed and replaced by the 1993 Act which came into force in February 1993. The matters earlier covered by ss. 30, 31 and 32 of the 1948 Act were then provided for in ss. 51, 52 and 53 of the 1993 Act. In the instant case before us, all the relevant transactions particularly the issuing of the MOD by the koperasi in favour of the bank, took place in 2001 - 2002, the period when the 1993 was fully in force. Therefore, the relevant laws for consideration for the purpose of this appeal is obviously the 1993 Act.

[50] For ease of comparison ss. 51, 52 and 53 of the 1993 Act are reproduced below:

Loans by a registered society

51 (1) No registered society shall grant any loan or other credit facility except to-

(a) its members;

(b) its employees;

(c) its subsidiary or subsidiaries; or

(d) another registered society.

and such loan or other credit facility shall be subject to-

(aa) the regulations and by-laws of such society; and

(bb) in the case of its subsidiary or subsidiaries or another registered society,

the approval of the Registrar General also.

(2) Subsection (1) shall not apply to a registered society that is permitted to grant any loan or other credit facility in accordance with the provisions of any other written law governing its operations.

(3) The Minister may, by general or special order, prohibit or restrict the lending of money on a charge or mortgage of immovable property by any registered society or class of registered societies.

Restriction On Borrowing

52 (1) A registered society may, subject to the approval of its general meeting or special general meeting, borrow funds from its members and non-members to be used for a specific purpose in its business.

A (2) A registered society shall determine annually, at a general meeting, the maximum limit of indebtedness in respect of existing and new borrowings and deposits which may be incurred in the coming year.

Restriction on other transactions with non-members

B 53. Subject to sections 51 and 52, the transactions of a registered society with persons other than its members shall be subject to such prohibitions and restrictions as may be prescribed by its by-laws.

[51] One material different between s. 32 of the 1948 Act and s. 53 of the 1993 Act which dealt with the same issue of "restriction on other transactions with non-members" is that the words "the rules" in the 1948 Act C had been substituted with the words "its by-laws" in the 1993 Act, which is defined under s. 2 thereof to mean the registered by-laws made by a registered society in the exercise of any power conferred by the Act and includes a registered amendment of the by-laws. The legal effect of this difference is that other transactions between a co-operative society and D non-members are now governed by s. 53 of the 1993 Act and these transactions are no longer governed by "the rules" prescribed by the minister but by "the by-laws" of the co-operative society concerned. Therefore, the decisions of the Supreme Court in *Malaysia Shipyard* (*supra*) and *Chase Manhattan* (*supra*) which interpreted different set of laws that has already E been wholly repealed could not be applied, save/or the general pupils, in dealing with the instant case before us. The facts and the laws can clearly be distinguished. Under the 1993 Act, the "by-laws" of a co-operative society has become an important element in determining the validity of "other transactions between the cooperative and non-member".

F **[52]** For the purpose of the instant case, we can still adopt and follow the general principle of law as adopted by the Supreme Court in *Malaysia Shipyard* (*supra*) and *Chase Manhattan* (*supra*) that "a corporation created by statute for particular purposes can only make such contracts as it is expressly or by necessary implication empowered to make by the statute creating it; G and contracts purporting to be made by statutory corporations which are outside the powers conferred by statute are *ultra vires* and *void ab initio*". However, the relevant "by-laws" of the koperasi must also be considered.

[53] Paragraphs 4 and 5 of the koperasi's by-laws are relevant and applicable to determine the issue under s. 53 of the 1993 Act. Paragraph 4 provides:

H 4. Tujuan Koperasi ini ialah untuk memajukan kepentingan sosio-ekonomi ahli-ahli menurut prinsip-prinsip Koperasi dengan menggalakkan penanaman modal untuk menjalankan perniagaan dan pelaburan yang boleh menguntungkan.

[54] Paragraphs 5 (c), (e), (f) and (g) provide:

I 5. Bagi mencapai tujuan tersebut, koperasi bolehlah, tertakluk kepada peruntukan-peruntukan Akta dan kaedah-kaedah, menjalankan sebarang kegiatan yang berikut:

...

(c) membeli, mengambil, mendapatkan, memegang, memiliki, mempunyai, menguruskan, memajukan, menjayakan, mengembangkan, mengusahakan, menjualkan, tukar menukar, sewa menyewa, pajak memajak atau menggadai akan tanah-tanah untuk Koperasi ini atau bagi pihak ahli-ahli untuk ditanam dengan getah, kelapa sawit, kelapa dan lain-lain dan membuat apa jua yang perlu yang difikirkan boleh menjadi berfaedah kepada Koperasi ini atau ahli-ahlinya;

(d) membeli, mendirikan, membangunkan, membina, memegang, memiliki atau mendapatkan dengan jalan menyewa, menerima pajak atau gadaian akan bangunan-bangunan yang hendak digunakan sebagai pejabat untuk menjalankan pekerjaan Koperasi atau untuk menjalankan perniagaan dan perusahaannya atau yang mustahak dan kesempurnaan bagi tempat-tempat kediaman pekerja-pekerja perusahaan Koperasi ini;

(e) memegang, memiliki atau mempunyai lain-lain harta yang kekal dan yang boleh dianjak yang dikehendaki untuk tujuan-tujuan Koperasi ini;

(f) menjual menyewa, memajakkan, menggadaikan, menukar, mengubah dan membaiki akan bangunan-bangunan dan harta-harta hak Koperasi ini dan membuat apa-apa jua yang difikirkan perlu;

(g) membuat perjanjian dengan ahli-ahli dan bukan ahli dan mana-mana Koperasi yang berdaftar dengan tujuan memberi kemudahan bagi perjalanan Koperasi ini;

...

[55] Paragraph 4 of the by-laws and s. 4(1) of the 1993 Act clearly provide that the object and purposes of the koperasi is for the promotion of the economic interest of its members in accordance with co-operative principles "dengan menggalakkan penamaan modal untuk menjalankan perniagaan dan pelaburan yang boleh menguntungkan".

[56] The terms "co-operative principles" as defined under s. 2 of the 1993 Act includes:

(a) voluntary and open membership;

(b) democratic management;

(c) limited return on capital contributed by members;

(d) equitable division of profits;

(e) promotion of co-operative education; and

(f) active co-operation among registered societies.

[57] A co-operative society once duly registered under the 1993 Act shall become a body corporate with perpetual succession and a common seal and with power to hold movable and immovable property of every description, to enter into contracts, to institute and defend suit and other legal proceedings and to do all things necessary for the purposes for which it is constituted (s. 9).

[58] In the present case, the evidence adduced show that the koperasi was not a mere independent third party who gave guarantee to a loan facility granted by the bank to a total stranger. The evidence show that the koperasi was the main "actor" or the main participant in the whole series of related transactions right from beginning when on 26 February 2001 it acquired 100% equity of Terokai Pertiwi Sdn Bhd (TPSB) which at that time held 66 years lease of the two lands in Gua Musang classified as agricultural lands for the purpose of oil palm plantation. The koperasi intended to develop the lands into oil palm plantation; engaged EFCM as a consultant and contractor to carry out the project development; assisted EFCM to obtain loan facility from the bank and subsequently provided the MOD for a value of RM25 million for the same purpose in favour of the Bank. In fact after the project proceeded and loan disbursed by the bank, it was the koperasi who issued the progress certifications for job completion for the purpose of progressive disbursement of the loan for the project. Under the MOD, the koperasi promised to provide security deposit of RM25 million, however only RM13 million was provided (leaving a balance of RM12 million. The contractor, EFCM, failed its repayment as scheduled in the facility agreement and the koperasi also failed to top-up the balance of the security deposit under the MOD.

[59] As clearly stated in para. 2 of the letter of offer dated 6 December 2001 issued by the bank, the loan was granted for the sole purpose of financing the development of the lands owned by the koperasi (through its wholly-owned subsidiary, TPSB). In the project agreement with EFCM, the koperasi has agreed to deliver and deposit with the bank a sum of RM25 million by way of security deposit for the loan (s. 2.01(2) of the agreement). According to DW2, the Section Head of Portfolio Management & Control, Credit Risk Management Department of the bank, in his evidence:

> I would not have recommended for the approval of the loan and the loan would not have been granted to the Borrower had the Plaintiff refused to provide the Security Deposit. The loan was approved based on the Plaintiff's undertaking to provide the Security Deposit as stated in the Letter dated 13 November 2001.

[60] Further in his evidence, DW2 said:

> One of the conditions precedent for the effectiveness of the Development and Plantation Agreement was that the Borrower must have secured the financing. If the Plaintiff was unable to provide the Security Deposit, the collateral for the loan would not be sufficient and hence the defendant

would not have provided the financing to the Borrower which would have the effect of rendering the agreement between the Plaintiff and the Borrower in respect of the Development Project ineffective.

[61] The project development for the oil palm plantation to be carried out by EFCM was a turnkey project whereby after the project completed and the lands have been developed and planted with oil palm, it would be delivered to the koperasi, through its wholly-owned subsidiary, TPSB. The prospective revenue for the koperasi for the sale of raw oil palms fruits was estimated to be RM140 for metric ton at that time.

[62] With this background, the koperasi was not a total stranger or an independent third party that has no relation at all to the loan granted to EFCM. The koperasi, clearly has an interest in the loan granted to EFCM because as testified by DW2, without the loan from the bank, the development and plantation agreement could not be affected and the oil palm project could not be carried out.

[63] At all material times, the koperasi did not dispute the validity of the MOD provided by them to the bank. In fact a copy of the koperasi's by-laws were handed over to the bank (through DW2) by one Encik Abu Samah, the general manager of the koperasi at that time, to convince the bank that the koperasi has the authority to provide the MOD in favour of the bank. The koperasi only sought to dispute the validity of the MOD for the first time by a letter dated 31 December 2007 after the deposit was uplifted by the bank. In that letter, the koperasi claimed that the MOD was invalid and demanded the bank to return the amount deposited together with interest and profits.

[64] Generally, by-laws of a co-operative society, made by the society itself, are merely rules of conduct governing its internal management. This view was expressed by the Supreme Court in *Malaysia Shipyard* (*supra*) and followed by the High Court and the Court of Appeal in the instant case. However, by-laws of a co-operative society has been given the force of law under s. 53 of the 1993 Act. That being the case, in view of the provision of s. 53 of the 1993 Act, non-members (including the bank) are entitled to rely on the koperasi's by-laws as they relate to "other transactions" with them.

[65] The word "by-laws" has been incorporated under the present s. 53 of the 1993 Act. Under s. 2 the 1993 Act, "by-laws" refers to "the registered bylaws" ie, the "by-laws" prepared by a co-operative society and registered by the Registrar General of Co-Operative of the 1993 Act. Such "by-law" may be amended and registered by the Registrar General under s. 18 of the 1993 Act, from time to time.

[66] Section 53 of the 1993 Act (as well as s. 32 of the repealed 1948 Act) deals with "transactions with persons other than its members". The "transactions" under s. 53 are "subject to ss. 51 and 52". Section 51 deals with loans to be given by registered co-operative society to the listed persons

under sub-s (1). Section 52 deals with power of a registered co-operative society to borrow funds from members and non-members. We are of the view that the effect of words "subject to ss. 51 and 52" is that transactions with non-member cannot be inconsistent with ss. 51 and 52 as regards to loans to be granted by a co-operative society and funds to be borrowed by a co-operative society from member and non-member. Therefore, "transactions under s. 53" cannot be transactions in the form of loans to be granted under s. 51 and funds to be borrowed under s. 51. "Transactions" under s. 53 must be one that relate to other types of transactions of a co-operative society subject to such prohibitions and restrictions as may be prescribed by its-by-laws.

[67] Abdul Hamid CJ (Malaya) (as he then was) in *Malaysia Shipyard* (*supra*) had expressed his view as a general rule on the word "transactions" used in s. 32 of the 1948 Act as follows:

> As can be seen, a guarantee is a transaction, in effect it is a contract whereby the Respondent accepts a commitment making itself liable to pay a sum of money upon the happening of a certain event. In essence, it is a contingent liability. As it is basically a financial commitment involving the payment of money, immediate or otherwise, the power so to do must in my view, be properly sanctioned by the Act.

[68] Wan Suleiman SCJ, in His Lordship's dissenting judgment, described "transaction" in the following words:

> Before we proceed to consider whether the contract of guarantee comes within the express or implied terms of the statutory provisions, let us now consider what the word "transactions" in section 32 means. First, I see no reason why the plain dictionary meaning of this word should not be applied. To "transact" according to the *Shorter Oxford English Dictionary* is "to carry through negotiations, to have dealings, to do business, to treat". It is in the same sense that the word is used in *Smith v. Small*, a decision of the House of Lords relied upon by the Respondents, of which I shall have more to say in a somewhat different context.
>
> The word "transaction" will therefore include a contract at of guarantee. It is in the present instance a dealing, a business activity between Respondents and the non-member.
>
> I have considered, and with respect, would reject the argument that because loans and borrowings are specifically dealt with in two specific sections (sections 30 & 31), such an important matter as the power to give guarantees which is, at the very least as vital as the former two, should be specifically conferred by yet another section, the absence of which must raise grave doubts as to whether the legislature had intended to grant it, or that a general reference to "transactions" can therefore refer to only dealings of a minor character incidental to the proper functioning of the Respondent society.

[69] Seah SCJ in His Lordship's dissenting judgment in *Malaysia Shipyard* (*supra*) expressed his view as follows: A

> It is plain that section 32 expressly authorises and empowers the respondents to enter into transactions with non-members subject only to the limitations imposed by the rules contained in section 51 of the Act. Now, it is conceded that there is no rule, express or implied, forbidding B the respondents from giving a guarantee to non-member. But it was adumbrated by learned counsel for the respondents that the word "transactions" in section 32 ought to be given a restricted meaning and that the word does not extend to the giving of "a guarantee". With respect, I am unable to accede to this contention. "Transactions" in the context of this case, must by necessity relate to all dealings, expressly or C impliedly, authorised by sections 8 of the Act. Since the respondents are expressly empowered by section 8 to enter into contracts and since "guarantee" is a form of contract under section 79 of the Contracts Act 1950 it seems to follow that "transactions" as used in section 32 should be construed to include "a guarantee". A *fortiori*, in the case of *Small v. Smith*, the House of Lords appears to have ruled that the expression D "transaction" included "a guarantee". I would adopt this construction and find there is no merit in this submission.

[70] There are limitations to the scope of "transaction" allowable under s. 53 of the 1993 Act. First, the transaction must not be inconsistent with ss. 51 and 53 as regards to granting of loans and borrowing of funds by a E co-operative society. Secondly the transaction must be with persons other than its members; and thirdly, such transaction shall be subject to such prohibitions or restrictions as may be prescribed by its by-laws. If the transaction is expressly prohibited by its by-laws, then it cannot be done by a co-operative society. The said transaction is thus *ultra vires* and *void ab* F *initio*.

[71] In the instant case, exact nature of the MOD issued by the koperasi in favour of the bank is in the form of a guarantee. On this point, Abdul Hamid CJ (Malaya) (as he then was) in *Malaysia Shipyard* (*supra*) clearly ruled that "a guarantee is a transaction". In effect it is a contract whereby the issuer G or guarantor (in this case, the koperasi) accepts a commitment upon happening of a certain event, and in relation to fund, it means "a sum of money pledged as a contingent indemnity for possible loss". The word "guarantee" is defined in *Words and Phrases Legally Defined* to mean "as accessory contract, whereby the promisor undertakes to be answerable to the H promise for the debt, or miscarriage of another person, whose liability to the promise must exist or be contemplated".

[72] It was also expressed by Wan Suleiman, SCJ in *Malaysia Shipyard* (*supra*) that "the word "transaction" will therefore include a contract of guarantee. It is in this present instance a dealing, a business activity between I the respondents (the co-operative society) and the non-members".

[73] The main general principle applicable, agreed and adopted by all the five judges in *Malaysia Shipyard* (*supra*) is that:

> The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporations, or may be fairly required as incidental to, or consequential upon, those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.

[74] This general principle has been accepted and acted upon by the courts in England and in Malaysia. (see: *Colman v. Estern Counties Rly Co* (*supra*), *Small v. Smith* (*supra*) and *PP v. Datuk Hj Harun Hj Idris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 180).

[75] The gist of the said general principle as stated by Salleh Abas LP and Abdul Hamid CJ (Malaya) (as he then was) in *Malaysia Shipyard* (*supra*) is that "the word "transaction" under s. 32 of the 1948 Act should only relate to such power as a co-operative society reasonably and properly requires for the purpose of carrying out objects of its incorporation. I would hasten to add that the word "transactions" should also relate to such power to give effect to matters covered by the rule made under s. 51 of the Act".

[76] Applying the above general principle to s. 53 of the 1993 Act and in view of the fact that the word "rule" as appeared in s. 32 of the 1948 Act, has been substituted with the word "by-laws", we are of the view that the word "transaction" (appearing in s. 53) of the 1993 Act, should relate to such power to give effect to matters covered by the koperasi's by-laws, particularly paras. 4 and 5.

[77] The object or purpose of incorporation of a registered co-operative society is an important element to be considered in determining whether a "transaction" under s. 53 of the 1993 Act is *ultra vires* the scope of the said section. In the present case, the object or propose of the koperasi can be found in s. 4 of the 1993 Act as well as paras. 4 and 5 of its by-laws.

[78] Section 4(1) provides:

> 4(1) a co-operative society which consists of individual persons only and which has as its object the promotion of the economic interest of its members in accordance with co-operative principles may be registered under this Act as a primary society.

[79] Paragraph 4 of the koperasi's by-laws provides:

> Tujuan Koperasi ini ialah untuk memajukan kepentingan sosio-ekonomi ahli-ahli menurut prinsip-prinsip Koperasi dengan menggalakkan penanaman modal untuk menjalankan perniagaan dan pelaburan yang boleh menguntungkan.

[80] As stated earlier, the issuing of the MOD by the koperasi in favour of the bank is part of the transactions to carry out the koperasi's object or intention to own and develop oil palm plantation by the contractor (EFCM) in Gua Musang, Kelantan. It is not disputed in evidence that the MOD was the most essential collateral or security to the granting of loan by the bank for the EFCM to implement the project development on a turnkey basis for the benefit of the koperasi through its wholly-own subsidiary, TPSB. According to DW2, without the MOD issued by the koperasi, the bank would not have granted the loan facility; and without the loan facility, the lands in question in turn would not have been developed; and the koperasi's oil-palm plantation could not have proceeded. Therefore, the issuing of the MOD by the koperasi cannot be treated in isolation or independently. There was clear nexus between the loan facility granted by the bank to EFCM, the oil palm project in Gua Musang, the MOD and the benefits to be derived by the koperasi upon completion of the turnkey project through its wholly-own subsidiary, TPSB. These transactions are clearly in line with the koperasi's object for the promotion of the socio-economic interest of its members by way of capital investment and profitable business.

[81] The prospective revenue for the sale of raw oil palm fruits for the koperasi upon completion of the project was estimated to be RM140 per metric ton at that time. Section 9 of the 1993 Act and para. 5(a), (d), (e), (f) and (g) of its by-laws empower the koperasi to hold movable and immovable property of every description, to enter into contracts and to do all things necessary for the purposes for which it is constituted. In other words, the issuing of the MOD in favour of the bank "is necessary and properly required for carrying into effect" the purpose of its incorporation. In the circumstances of the present case, the MOD "is necessary and properly required for carrying into effect the object or purposes of its incorporation".

[82] The benefits to the koperasi will ultimately be enjoyed as benefits to its members. The evidence adduced during trial clearly supported the existence of such benefits to the koperasi, unlike the nature of guarantees in *Malaysia Shipyard* (*supra*) and *Chase Manhattan* (*supra*) which both concerned the giving of guarantees of doubtful propriety with no tangible benefit either directly or indirectly to the co-operative society or its members. The guarantees in both the cases mentioned above were purely for the benefit of independent third party beneficiaries which had no nexus whatsoever with the co-operative societies concerned.

[83] In the present case, the Court of Appeal, on 23 July 2013, affirmed the decision of the High Court and dismissed the bank's appeal. The reasoning of the Court of Appeal, in essence, is the same as that of the High Court, save for one material difference ie, that in arriving at its decision the Court of Appeal applied the 1993 Act as amended by the 2007 amendment which only came into effect on 1 January 2008, about six to seven years after

A the relevant transactions had taken place. With due respect the Court of Appeal had erred in applying the 2007 amendment in determining the validity of the MOD. The relevant ss. 51, 52 and 53 of the 1993 Act were substantially and materially amended by the 2007 amendment (Act A1297).

B **[84]** The Court of Appeal held *inter alia* that the MOD in question was invalid and unenforceable as it was issued by the koperasi in contravention of s. 51(1) of the 1993 Act (as amended by the 2007 amendment). At para. [34] of its judgment, the Court of Appeal ruled that s. 51(1) expressly prohibits a co-operative society from granting any Islamic financing or giving credit facility except to the categories of persons mentioned therein. C Apparently the Court of Appeal was relaying on the terms "credit facility" under s. 51(1) and its definition under s. 2 of the 2007 amendment. In the said definition, "credit facility" refers the same meaning as defined in the Malaysia Co-operative Societies Commission Act 2007 (Act 665), which was not even in existence then.

D **[85]** With due respect the Court of Appeal should not have relied on provisions of laws which were not in existence or not in force at the time when the relevant transactions took place in 2001-2002. Section 19(1) of the Interpretation Acts 1948 and 1967 (Act 388) provides that "the commencement of an Act or subsidiary legislation shall be the date provided E in or under the Act or subsidiary legislation or where no date is so provided, the date immediately following the date of its publication in pursuance of s. 18".

[86] When the MOD was issued by the koperasi on 22 March 2002 the words "credit facility" was not defined anywhere in the 1993 Act which was applicable then. It was only when the 2007 amendment and Act 665 come F into force in 2008 that the words "credit facility" was defined to mean, *inter alia*, "(c) the giving of a guarantee or the provision of any security in relation to the obligations of any person;" and applying the said definition, the Court of Appeal held that the MOD in question as a guarantee was a "credit facility" and therefore its issuance by the koperasi contravened s. 51.

G **[87]** Since the words "credit facility" was not expressly defined in the 1993 Act when the MOD was issued by the koperasi and it was also not defined in the 1948 Act, when *Malaysia Shipyard* (*supra*) was decided by the Supreme Court, the words must therefore be interpreted based on their ordinary usage in the English language ie, a facility whereby money lent or H made available or the ability to obtain goods and services payment under such an arrangement that payment will be made in the future (see: *The Concise Oxford English Dictionary*).

[88] "Guarantee" on the other hand, is slightly of different nature in its ordinary usage. This was clearly expressed by Abdul Hamid CJ (Malaya) (as I he then was) in *Malaysia Shipyard* (*supra*) in the following words:

> First, what is a "guarantee". It is defined in the *Shorter Oxford English Dictionary*, in relation to fund, to mean "a sum of money pledged as a contingent indemnity for possible loss". The same word is defined in *Words and Phrases Legally Defined* to mean "an accessory contract, whereby the promisor undertake to be answerable to the promisee for the debt, or miscarriage of another person, whose primary liability to the promise must exist or be contemplated … In effect it is a contract whereby the respondent (the promisor) accepts a commitment making itself liable to pay a sum of money upon the happening of a certain event.

[89] Section 79 of the Contracts Act 1950 defines a "contract of guarantee" as "a contract to perform the promise, or discharge the liability of a third person in case of its default ...".

[90] Without an express definition in the relevant statute which governs the transaction in question, a "guarantee" cannot be said to be a "credit facility" under the scope of ss. 51 and 52 of the 1993 Act. In *Malaysia Shipyard* (*supra*), Salleh Abas LP opined:

> The giving of a guarantee is neither giving nor receiving loan. It is a distinct and separate kind of dealing altogether. Although a guarantee purports to create liability on the surety, in no sense could it be said that the surety is borrowing the guaranteed sum from the creditor (the person to whom the guarantee is given) or giving a loan of that amount to the principal debtor (the person for whose advantage the guarantee is given). (See *In Re Queen Anne and Garden Mansions Co*.) Thus, since a guarantee is neither a loan nor a borrowing, both ss. 30 and 31 do not apply to the giving of a guarantee by the respondents

[91] The 1993 Act *vide* the 2007 amendment had no retrospective effect and therefore should not be considered at all in dealing with the present case. The 2007 amendment should not affect the previous operation of the 1993 Act or anything duly done or suffered thereunder. Such amendment also should not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed or amended law. This is clearly provided for under s. 30(1) of the Interpretation Acts 1948 and 1967 (Act 388). The 2007 amendment is thus not applicable to the instant case. The present case has to be resolved according to the provisions of the 1993 Act prevailing at the time when the related transactions took place. (see: *Lembaga Jurutera Malaysia v. Leong Pui Kun* [2008] 6 CLJ 93; [2009] 2 MLJ 36 (FC); *Keith Sellar v. Lee Kwang And Tennakoon V Lee Kwang* [1980] 1 LNS 36; [1980] 2 MLJ 191; and *Badan Pengurusan Bersama Paradesa Rustika v. Sri Damansara Sdn Bhd* [2013] 9 CLJ 813; [2014] 1 MLJ 14 (FC)).

[92] For the reasons above stated the answer to question (1) posed before this court ought to be in the negative. Since question (1) is answered in the negative, question (2) (which exists on the assumption that the answer to question (1) is in the affirmative) therefore need not be answered.

[93] Question (3) is only relevant and required to be answered if the MOD issued by the koperasi in favour of the bank is not *ultra vires*.

[94] Question (3) is drafted on the premise that:

(i) there is a sum of money deposited and charged in favour of the bank as security for the loan to the borrower (EFCM);

(ii) the terms of the deposit is that it is not to be withdrawn or uplifted until the bank has exhausted all action against the borrower (EFCM) and other security providers; and

(iii) but the money deposited was prematurely withdrawn or uplifted by the bank before exhausting all the said action.

The real question is: where should the money go. - should it be returned to the koperasi free of charge. or to be restored (with accrued interest) on deposit to the bank, subject to charge?

[95] The MOD issued by the koperasi was "a continuing security, pledge or lien for the due payment to the bank by the borrower on demand of all monies due to the bank during the facility period". Under cl. 2 of the MOD, the koperasi *inter alia* "agrees and undertakes to continue to maintain the said deposit with the bank or at such places as the bank may from time to time direct during the period of this continuing security ...".

[96] As stated earlier, cl. 4 of the MOD empowers the bank to withdraw or uplift the said deposit and to apply the proceeds thereof towards the discharge of any amount due and owing to the bank, in the event the borrower (EFCM) fails to repay the loan due and owing to the bank during the facility period. However, this liberty to withdraw can only be exercised by the bank on condition that the bank has exhausted all available legal actions or proceedings against the borrower (EFCM) and other security parties to recover the amount due and owing by the borrower to the bank.

[97] Clause 13.2 of the "facility agreement" also provide for the same provision that "the bank hereby agrees with the borrower that in the event of the borrower commit any event of default or defaults as stipulated in cl. 13.1 hereof within the facility period, the bank shall exhaust all available legal actions against the borrower and other security party before exercising the bank's right to utilise fixed deposit as provided by KPMNJ".

[98] As a matter of fact, it is not in dispute that during the facility period, the borrower (EFCM) defaulted in its repayment of the loan. On 6 December 2007, the bank unilaterally uplifted the entire deposit to reimburse itself to set off part of the debts owed by EFCM.

[99] The evidence clearly show (even admitted by the bank's officer - DW1) that the bank had not exhausted all actions against the borrower (EFCM) and the other security parties before exercising its right to withdraw or uplift the fixed deposit as clearly require under cl. 4 of the MOD and

cl. 13.2 of the facility agreement. No action was taken against the two chargors who had expressly covenanted to repay the loan granted to the borrower (EFCM) to the extent of RM25 million. One of the properties charged by one of the chargors, was only sold by auction on 20 August 2008 (long after the fixed deposit had been uplifted on 6 December 2007). The bank apparently had sued the borrower (EFCM) and the individual guarantors and obtained judgment in default against them on 22 June 2007. However, no execution proceedings whatsoever were taken against them to enforce the said judgment in default. Yet, the bank proceeded unilaterally to uplift the fixed deposit on 6 December 2007. Clearly, the unilateral uplifting of the fixed deposit under the circumstances, amounted to a clear violation of the proviso to cl. 4 of the MOD and cl. 13.1 of the facility agreement by the bank. The said uplifting was premature and contractually invalid. In this respect, the High Court and the Court of Appeal were correct in coming to their decision that the bank's act amounted to a breach of contract.

[100] As has been held earlier, the MOD dated 22 March 2002 issued by the koperasi in favour of the bank was valid and enforceable; and not *ultra vires* the relevant provisions of the 1993 Act. Being a continuing security pledge or lien for the due payment to the bank during the facility period, the MOD binds and can be enforced by both parties, the bank as well as the koperasi. However, we are of the view that breach by the bank in prematurely uplifting the entire fixed deposit in violation of the proviso to cl. 4 of the MOD did not render the MOD *void ab initio*. In the circumstances of the case, all that the koperasi is entitled to is to be put in a position as if the breach had not occurred. If the breach had in any way resulted loss to the koperasi, damages would have to be assessed, so far as money could do so, to compensate the koperasi by placing it in the same position as if the breach had not occurred.

[101] The above proposition was adopted by Parke R in *Robinson v. Harman* [1843-1860] All ER Rep 383 at p. 385 when he said "where a party sustain a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed". If the koperasi is to be put in a better position than it would have been if had there been no breach by the bank in prematurely uplifting the fixed deposit, then it would be contrary to the principle enunciated in established authorities. (see: *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777; *Koufos v. C Czarnikow Ltd* [1969] 1 AC 350; and *Hadley v. Baxendale* [1854] 9 Ex 341; 156 ER 145).

[102] In the present case, the order of the High Court (and affirmed by the Court of Appeal) directing the return of the fixed deposit amount placed under the MOD to the koperasi, when the loan for the purpose of the project development was disbursed by the bank based on the certifications of works

done by the koperasi and the oil palm plantation project was 63.4% completed, is clearly against above settled principle that the koperasi should not be put in a better position than it would have been if the breach by the bank did not take place. All that should have been ordered in the present case is for re-instatement of the fixed deposits (with interest that would have accrued on them) subject to terms of the MOD which has earlier been held to be valid and enforceable in law. (see: *C & P Haulage (a firm) v. Middleton* [1983] 3 All ER 94).

[103] For the various reasons adumbrated above and in view of the fact that the answer to question (1) is in the negative, the answer to question (3) should be that the koperasi (as the chargor in the MOD) is only entitled to the reinstatement or restoration of the fixed deposit money (with any interest that would have accrued) subject to the terms of the MOD (the charge).

The Bank's Counterclaim

[104] The bank's counterclaim against the koperasi is for the sum of RM12 million (with interest and costs) being shortfall the koperasi had agreed or undertook to pay progressively as security deposit pursuant to the MOD issued by the koperasi in its favour.

[105] Under the MOD, the koperasi agreed to deposit and charge in favour of the bank the total sum of RM25 million only as a continuing security pledge or lien for the due payment of the loan by EFCM particularly as specified in the schedule thereto, as follow:

(a) 1 December 2001 - RM1 million;

(b) 1 March 2002 - RM4 million;

(c) 1 June 2002 - RM4 million; and

(d) 1 June 2003 - RM16 million

[106] As at 1 June 2003, the koperasi however had only deposited and pledged the sum of RM13 million with the bank under the MOD. By various letters (between 11 March 2004 and 27 December 2005) the bank had requested the koperasi to deposit the shortfall of RM12 million due under the terms of the MOD. The koperasi however, failed to response. Consequently, on 6 December 2007, the bank uplifted the RM13 million deposit pledged under the MOD.

[107] In its defence to the counterclaim, the koperasi denied liability on the sole ground that the MOD in question was issued beyond its scope of authority or power, under the relevant laws, the 1993 Act; and therefore was *void ab initio* and unenforceable.

[108] The High Court agreed with the koperasi that the MOD was *ultra vires* and therefore *void ab initio* and unenforceable. On 19 June 2012, the koperasi's claim was allowed and the bank's counterclaim was dismissed with costs. On 27 June 2012, the bank filed a notice of appeal, appealing against the whole decision of the High Court. Effectively, the appeal included that part of the decision dismissing the bank's counterclaim with costs. In the memorandum of appeal (to the Court of Appeal) the bank also stated that "the appeal was against the whole of the said decision". In (para. 3) of its memorandum of appeal, the bank claimed *inter alia* that the learned Judicial Commissioner had erred in law and in fact when he dismissed the bank's counterclaim for the balance of RM12 million to be paid to the bank pursuant to the MOD. The Court of Appeal on 3 June 2014 dismissed the bank's appeal (which in effect includes the bank's appeal on its counterclaim).

[109] The bank then, having obtained leave to appeal on 20 January 2014 appealed to this court against the whole decision of the Court of Appeal. The first ground listed by the bank in its memorandum of appeal dated 7 March 2014 states that:

> The Court of Appeal erred in law and in fact in affirming the decision of the High Court dated 19 June 2012, which allowed the Respondent's (the Koperasi's) claim and dismissed the Appellant's (the Bank's) appeal.

[110] In his submissions before us, learned counsel for the bank raised the issue of its counterclaim to the effect that the counterclaim should be allowed and judgment entered against the koperasi for the sum of RM12 million, together with interest at 5% per annum from 1 June 2003 or such other date as may be ordered until the full payment, to be held under the terms of the MOD in question.

[111] With the above background, we feel that the issue of the bank's counterclaim is part of the present appeal before us and it is only proper and appropriate for this court deals with it here.

[112] The facts (based on the evidence available) that form the basis of the bank's counterclaim against the koperasi is quite simple and straight forward. It is based on the validity of the MOD issued by the koperasi to the bank. At the courts below (both High Court and the Court of Appeal) the bank's counterclaim was dismissed with costs on the sole reason that the MOD in question was *void ab initio* and unenforceable. But in this court, as we have concluded earlier that the MOD is (and still is) valid and enforceable. In effect it binds both parties, the bank and the koperasi according to its terms.

[113] The schedule to the MOD, which is referred to in para. 1.1 thereof, clearly and expressly provides that the total agreed amount of RM25 million need to be deposited with the bank by 1 June 2003. Unfortunately, the koperasi failed to fulfil this obligation, despite various reminders sent by the

bank thus in breach of an important term of the MOD. The records show that as at 1 June 2003 the koperasi had only deposited the sum of RM13 million with the bank, thus leaving a shortfall of RM12 million. Contractually, the koperasi had committed a breach of its own MOD as agreed between them.

[114] The loan had been disbursed and the project in question had substantially been completed. According to the bank's records, it had in total disbursed the sum of RM23,935,050 under the loan facility for the purpose of the project. Any dispute as to the physical implementation of the project must be dealt with between the koperasi and EFCM as the contractor based on the terms of the development and plantation agreement dated 12 November 2001 entered into between the koperasi and EFCM. The issue of non-completion of the project is not the concern of the bank. The bank's obligation is to provide and disburse the loan as certified by the koperasi in accordance with the facility agreement as well as the MOD. The bank may have been at fault in prematurely uplifting the deposit in violation of cl. 4 of the MOD, but that alone cannot be a ground for the koperasi to refuse or neglect to fulfil its obligation to make payment as stipulated in the schedule to the MOD. Clause 15 of the MOD provides, *inter alia*, "... nor shall any single partial or defective exercise by the bank of any such right power privilege or remedy preclude any other further exercise under this memorandum of deposit or any other power privilege or remedy".

[115] For the above reason and since the MOD is valid and enforceable, it is our considered view that the koperasi is obliged to make payment for the shortfall of the deposit and therefore the bank's counterclaim must be allowed.

Conclusion

[116] The factual matrix of the present case before us clearly show that the koperasi was the main participant throughout the whole transactions right from beginning when it decided to acquire the whole equity in TPSB for the purpose of developing oil palm plantation for its own benefit in Gua Musang, Kelantan, until the time when it made a complete "u-turn" claiming that the MOD issued by it for the purpose of obtaining loan from the bank which had effectively generated substantial benefit to it at the expense of the bank. In the circumstances, the conduct of the koperasi was plainly inequitable and unconscionable which no court of law can condone.

[117] For the various reasons adumbrated above, we hold that the answer to question (1) ought to be in the negative. Question (2) which exists and only relevant on the assumption that the answer to question (1) is in the affirmative need not be answered.

[118] Since the answer to question (1) is in the negative, question (3) ought to be answered that the koperasi (as the chargor in the MOD) is only entitled to the restoration of the money (with any interest that would have accrued) on deposit subject to the terms of the MOD which is still valid, enforceable and binding on the parties.

[119] The bank's counterclaim against the koperasi is allowed.

[120] In the upshot, we therefore allow bank's appeals with costs and set aside the decision of the High Court and the Court of Appeal. We make an order that the bank to reinstate the fixed deposit money (with interest that would have accrued) subject to the terms of the MOD, within 30 days from today. We also make an order that the koperasi is to make payment for the shortfall of the deposit within 30 days from today.